No. 75-1490

In the Supreme Court of the United States

OCTOBER TERM, 1976

MAX ZIVIAK, ETC., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Pursuant to Rule 16 of the Rules of this Court, appellee moves to affirm the judgment of the district court.

STATEMENT

1. This case involves the constitutionality of a classification in a superseded statutory scheme for the distribution of the "compensation" (*i.e.*, service-connected disability benefits; see 38 U.S.C. 310) of a veteran who was furnished hospital treatment or institutional or domiciliary care by the Veterans' Administration prior to August 1, 1972. That distribution turned upon two principal factors: whether the veteran was competent, and whether he had a wife, children, or dependent parents.[1]

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[1] A parent's dependency is determined in accordance with regulations prescribed by the Administrator, but dependency "shall not be denied * * * in any case * * * where the monthly income for a mother or father, not living together, is not more than $105 * * *." 38 U.S.C. 102(a)(2).

If the veteran was competent and established that he had a wife, children, or dependent parents, compensation was paid to him pursuant to 38 U.S.C. 310 without reduction during the period of institutional care. In that event, no accumulated, unpaid compensation was available for distribution at the time of the veteran's release or death.

If the veteran was competent but did not establish that he had a wife, children, or dependent parents, his monthly compensation payments were reduced, after six months of institutional care, to the greater of one-half his full compensation entitlement or $30. 38 U.S.C. (1970 ed.) 3203(a)(1) and (c). The unpaid compensation that accumulated during the remaining period of institutional care was paid to the veteran in a lump sum after his release. 38 U.S.C. (1970 ed.) 3203(a)(1). If the veteran died prior to release, and if he in fact left a surviving wife, children, or dependent parents, the accumulated, unpaid compensation was distributed to the surviviors in accordance with 38 U.S.C. (1970 ed.) 3203(a)(2)(A).

If the veteran was incompetent and had a wife, children, or dependent parent, his compensation was paid to a guardian, curator, or conservator empowered to make payments on behalf of the veteran and his dependents. See 38 U.S.C. 3202. As was the case with a similarly situated competent veteran, no unpaid compensation would have accumulated for distribution at a later time.

If the veteran was incompetent but did not have a wife, children, or dependent parent, his monthly compensation payments were reduced, after six months of institutional care, to the greater of one-half his full compensation entitlement or $30. 38 U.S.C. (1970 ed.) 3203(b)(1).[2] More-

[2] These payments were made to a guardian, curator, or conservator who could in turn make payments on behalf of the veteran and to his dependent parents. See 38 U.S.C. 3202.

over, if he had no wife or children and "his estate from any source equal[ed] or exceed[ed] $1,500, further payments of * * * compensation * * * [were] not * * * made until the estate [was] reduced to $500." 38 U.S.C. (1970 ed.) 3203(b)(2). In such event, however, the Administrator was empowered to "apportion and pay to the dependent parents of the veteran on the basis of need all or any part of the benefit which would otherwise be payable to or for such incompetent veteran." 38 U.S.C. (1970 ed.) 3203(b)(3). The unpaid compensation that accumulated during the period of institutional care was paid to the veteran "after the expiration of six months following a finding of competency [but] in the event of the veteran's death before payment of such lump sum no part thereof shall be payable." 38 U.S.C. (1970 ed.) 3203(b)(1). See also 38 U.S.C. (1970 ed.) 3203(b)(2).

2. Appellant is the father of an incompetent veteran who died prior to August 1, 1972, while being furnished institutional care by the Veterans' Administration. Since appellant's son was unmarried, had no children, and possessed an estate in excess of $1,500, payment of compensation on his behalf had been suspended during the period of institutional care pursuant to 38 U.S.C. (1970 ed.) 3203(b)(2). During this period, however, the Administrator, acting under the authority granted by 38 U.S.C. (1970 ed.) 3203(b)(3), paid appellant, as a dependent parent, $16,556.72 out of the compensation that had been withheld (Complaint App. 2).

At the time of the son's death, a total of approximately $55,000 in unpaid compensation had accumulated (*ibid.*). Appellant filed a claim with the Veterans' Administration seeking payment of this amount to himself. The Administration's Board of Appeals determined that, under 38 U.S.C. (1970 ed.) 3203(b)(1) and (2), the unpaid compensation was not payable to appellant (Complaint App. 4).

Appellant thereupon instituted this suit for injunctive and declaratory relief in the United States District Court for the District of Massachusetts on behalf of himself and all other similarly situated dependent parents of deceased, incompetent veterans. He contended that 38 U.S.C. (1970 ed.) 3203 impermissibly distinguished between competent and incompetent deceased veterans in providing for the distribution of accumulated, unpaid compensation to their dependent parents. A three-judge district court, convened pursuant to 28 U.S.C. 2282 and 2284, sustained the constitutionality of the statute and denied the requested relief.

ARGUMENT

Appellant's contention is that 38 U.S.C. (1970 ed.) 3203 (b) "unconstitutionally deprive[d] parents of deceased incompetent veterans of benefits paid to parents of deceased competent veterans * * *" (J.S. 5). Two preliminary observations should be made concerning that contention.

First, even under the superseded statutory scheme involved here, benefits were not normally paid to the parents of even unmarried and childless deceased, competent veterans.[3] If the veteran had established that he had a dependent parent, payment of compensation would have continued without reduction during the period of institutional care; no unpaid compensation would have accumulated for distribution after the veteran's death. As a general rule, therefore, nothing would be payable by the Administrator to the parents of a competent veteran at the veteran's death. Parents of such

[3]If the deceased, competent veteran died leaving a wife or child, any accumulated, unpaid compensation was payable to the surviving wife or child and not to the dependent parents. 38 U.S.C. (1970 ed.) 3203(a)(2)(A).

a veteran would be entitled to a distribution of accumulated, unpaid compensation only in the peculiar circumstances where the veteran, by failing to establish that his parents were dependent, suffered a withholding of compensation, but the parents, after the veteran's death, were able to show that they were in fact dependent. See 38 U.S.C. (1970 ed.) 3203(a)(1) and (a)(2)(A).

Second, even that narrow exception to the general rule has now been eliminated. Under current law, the compensation of a competent veteran is not reduced or withheld during a period of institutional care. See Section 104(a) of Pub. L. 92-328, 86 Stat. 394.[4] Accordingly, there are now no circumstances in which accumulated, unpaid compensation is paid to the dependent parents of a deceased, competent veteran.[5] The disparity of which appellant complains no longer exists.

In any event, as we now show, the prior statutory scheme was reasonable in its treatment of the parents of veterans, and its constitutionality was correctly sustained by the district court.

1. Prior to the amendment of the statute in 1972, Congress had chosen to pay compensation, if any, to an individual dependent parent of a veteran in no more than one of two mutually exclusive ways—(1) during the veteran's lifetime, either directly or through payments

[4]Moreover, the compensation of an incompetent veteran receiving institutional care is no longer reduced or withheld merely because he has no wife, child, or dependent parent. See Section 104(c) of Pub. L. 92-328, 86 Stat. 394. The compensation of such a veteran, who has no wife or child, is still withheld, however, as long as his estate exceeds $1,500 and until it is reduced to $500. 38 U.S.C. (Supp. IV) 3203(b)(1).

[5]Amounts previously withheld from the veteran under prior law were distributed to the veteran or his representative in a lump sum after the effective date of the new provisions. See Section 106 of Pub. L. 92-328, 86 Stat. 395.

made to the veteran or his representative, or (2) in a lump sum after the veteran's death.[6] The former method was prescribed for all veterans, whether competent or incompetent, not receiving institutional care: all compensation was paid directly to the veteran or, if the veteran was incompetent, to his representative; a competent veteran was free to provide support for his parents out of the payments he received; similarly, an incompetent veteran's representative was empowered to provide support for his parents. See 38 U.S.C. 3202(d).

The situation was somewhat different for veterans receiving institutional care. A competent veteran receiving such care was in effect given a choice whether to receive sufficient compensation to provide current support for his parents or to receive reduced compensation with the anticipation that the amounts withheld would be paid to him upon release, or to his surviving dependent parents, if any, at his death.[7] Thus the competent veteran's choice controlled the manner of payment to his dependent parents. Incompetent veterans receiving institutional care were, by definition, incompetent to make that choice. Accordingly, the dependent parents of such veterans were provided support directly by the Administrator. See 38 U.S.C. (1970 ed.) 3203(b)(3).

This scheme did not operate unfairly with regard to appellant or the class he represents. Appellant received

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[6]We are concerned here solely with the distribution of the veteran's compensation payable under 38 U.S.C. 310. Under 38 U.S.C. 415, parents of veterans who died as a result of a service-connected disability are entitled to dependency and indemnity benefits; but these benefits, which are payable without regard to the veteran's competency, are not at issue in this case.

[7]The choice existed by virtue of 38 U.S.C. (1970 ed.) 3203(c), which deemed the veteran unmarried and childless in the absence of affirmative proof to the contrary.

direct support during the period of his son's institutional care. He was therefore placed in the same position as the dependent parents of a competent veteran who had chosen to receive his full compensation in order to support them during a period of institutional care. And like such parents, appellant thereby was not entitled to receive additional compensation from the Administrator after the veteran's death. Insofar as appellant's claim is that he should be treated in the same manner as otherwise similarly situated parents of competent parents, therefore, the answer is that he has been.

The only dependent parents who received accumulated, unpaid compensation at their son's death were those as to whom there was a reasonable basis for believing that, unlike appellant, they had been deprived of support during the period of their son's institutional care, as a result of the withholding of compensation. Although some such parents may in fact have received support out of their son's reduced compensation, and therefore may have received an unintended double benefit (current support and lump sum payment), such isolated instances would not render the statutory classification unconstitutional. A presumption that such parents had been deprived of support, "though [it] may approximate, rather than precisely mirror, the results that case-by-case adjudication would show, [was] permissible under the Fifth Amendment * * *." *Mathews* v. *Lucas*, No. 75-88, decided June 29, 1976, slip op. 13-14.

2. Underlying appellant's contention here may be an unarticulated claim that equal protection is denied by paying incompetent veterans who receive institutional care less compensation than is paid to similarly situated competent veterans. An unmarried, childless incompetent veteran receives no compensation during the period of institutional care, so long as his estate exceeds $1,500. See 38 US.C. (Supp. IV) 3203(b)

(1); 38 U.S.C. (1970 ed.) 3203(b)(2).[9] The compensation of a competent veteran is continued without regard to the size of his estate. Thus appellant, as an heir of an incompetent veteran, may take less than would the heir of a competent veteran.

But this difference in treatment has a rational basis. In enacting the Veterans' Act, Congress was concerned not with equalizing the treatment of veterans' heirs but with rewarding veterans for their service by providing for their material well-being. That purpose would not be served by allowing compensation to swell the estates of incompetent veterans who are unable to control their disposition or enjoy their use. The needs of such veterans are met by the Veterans' Administration during the period of institutional care; no legitimate purpose would be served by paying additional, unneeded compensation to the veterans' representatives.

Congress chose to limit payments on behalf of such veterans in order to conserve public funds. Congressman Teague, Chairman of the Committee on Veterans' Affairs, in discussing this provision on the floor of the House of Representatives, explained (105 Cong. Rec. 7320-7321 (1959):

> * * * [T]his bill is designed to prevent the payment of gratuitous benefits for incompetent veterans, who are receiving care at public expense, from accumulating in excessive amounts and passing, upon the death of the incompetent veteran, to relatives having no claim against the Government on account of the veteran's military service.

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[9]Any compensation so withheld is restored to the veteran for his personal use if he regains competency. 38 U.S.C. (Supp. IV) 3203 (b)(1); see also 38 U.S.C. (1970 ed.) 3203(b)(2).

* * * * *

> About $65 million is involved * * *, a considerable portion of which it is believed will be saved by the passage of this legislation.[10]

Thus Congress explicitly weighed its obligation to the incompetent veteran against the fiscal interests of the United States and chose to pay the veteran amounts necessary to his well-being and to retain amounts that the veteran neither needed nor had the capacity to control or enjoy. This choice was rational and therefore may not be disturbed by the courts.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

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[10]Similarly, Congressman Mitchell observed (*id.* at 7321) that "in many instances incompetent veterans were accumulating large sums in their estates."